No. 91-194

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

QUILL CORPORATION,
Petitioner,
v.
STATE OF NORTH DAKOTA,
BY AND THROUGH ITS TAX COMMISSIONER,
HEIDI HEITKAMP,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of North Dakota

BRIEF AMICUS CURIAE OF THE DIRECT MARKETING ASSOCIATION IN SUPPORT OF THE PETITION FOR CERTIORARI AND IN SUPPORT OF SUMMARY REVERSAL

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QUESTION PRESENTED

Whether the North Dakota Supreme Court is obligated to follow the longstanding precedent of *National Bellas Hess, Inc. v. Department of Revenue*, 386 U.S. 753 (1967), in a case that is factually indistinguishable from *Bellas Hess*?

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STATEMENT OF INTEREST *

The Direct Marketing Association ("DMA"), a not-for-profit corporation, is the oldest and largest national trade association representing direct marketers and advertisers. DMA's membership—ranging from the very smallest "mom and pop" operations to "Fortune 500" companies—includes more than 3,200 firms located in all 50 states and 40 foreign countries. A majority of DMA's members are mail order companies which conduct interstate business

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* Counsel for all parties have consented to the filing of this amicus brief. *Amicus* has filed those consents with the Clerk of this Court pursuant to Sup. Ct. R. 37.2.

—sending catalogs and other advertising materials throughout the United States by mail, receiving orders for goods by mail or by telephone, and delivering goods to customers by interstate common carriers. Thus, DMA has a unique interest in the development of the law governing taxation of interstate mail order companies and a particular concern that states and local governments comply with the constitutional requirements articulated by this Court in *National Bellas Hess, Inc. v. Dep't of Revenue*, 386 U.S. 753 (1967). There this Court held that states may not impose use tax collection duties on out-of-state mail order companies unless the companies have a physical nexus with the taxing state. The decision below is admittedly at odds with *Bellas Hess* and is based entirely on the view that *Bellas Hess* is no longer good law. If not reversed by this Court, the decision of the North Dakota Supreme Court will spawn further confusion and conflict, and will encourage other state courts to disregard this Court's governing precedents.

For nearly a quarter of a century, states, businesses, and consumers have ordered their affairs based on the principles articulated by this Court in *Bellas Hess*. If North Dakota is dissatisfied with that decision, there is a clear remedy. As the Court pointed out in *Bellas Hess* itself, "this is a domain where Congress alone has the power of regulation and control." 386 U.S. at 760. Congress has the authority to fashion uniform rules in this area which would obviate the constitutional objections and take account of both the states' interests and those of the direct marketing companies.

ARGUMENT

Last Term in *Connecticut Commissioner of Revenue Services v. SFA Folio Collections, Inc.*, No. 90-1627, 111 S.Ct. 2839 (1991), the State of Connecticut urged that this Court grant certiorari to consider whether it should overrule its long-standing decision in *National Bellas Hess, Inc. v. Dep't of Revenue*, 386 U.S. 753 (1967). Review by this Court was said to be appropriate because of a conflict between the decision of the Supreme Court of Connecticut in *Folio* and the decision of the North Dakota Supreme Court in this case.[1] This Court denied certiorari, Justices White and Blackmun dissenting.

The petition here again seeks plenary review based on the same conflict.[2] Such plenary consideration is no more appropriate here than in *Folio*. But, in view of the clearly erroneous result reached by the court below, the appropriate course here is summary reversal rather than denial of certiorari.

I. THE NORTH DAKOTA COURT FAILED TO FOLLOW THIS COURT'S DECISION IN *BELLAS HESS* AND TO PERFORM ITS DUTY UNDER THE SUPREMACY CLAUSE

The North Dakota Supreme Court determined that this Court's decision in *Bellas Hess* is "obsolescent," and therefore is not binding on the courts of North Dakota.

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[1] 111 S.Ct. 2839. In that case, the Connecticut court based its decision on *Bellas Hess* (*see SFA Folio Collections, Inc. v. Bannon*, 585 A.2d 666, 670-71 (Conn. 1991)), and in his petition for certiorari, the Connecticut Commissioner urged that the Supreme Court reconsider the validity of *Bellas Hess*. *See* Petition for Writ of Certiorari, *Commissioner of Revenue Services v. SFA Folio Collections, Inc.*, No. 90-1627 at 7 (1991). *See also Cally Curtis Co. v. Groppo*, 572 A.2d 302 (Conn.), *cert. denied*, 111 S.Ct. 77 (1990) (refusal to review another decision based on *Bellas Hess* despite petitioner's request that this Court reconsider its decision).

[2] *See* Petition for Certiorari at 19-20 ("Pet.").

Pet. App. A10. It followed, said the court below, that North Dakota can impose use tax collection duties on an out-of-state mail order company with no physical presence in the State.

Contrary to the North Dakota court's analysis, no legal or factual change has undermined the principles of *Bellas Hess*. Despite the North Dakota court's protestations, this Court has never doubted *Bellas Hess*, and its rulings have consistently followed *Bellas Hess* since 1967. Under the Supremacy Clause,[3] the North Dakota courts must follow this Court's precedents.

A. Under *Bellas Hess* and an Unbroken Line of Supreme Court Precedent, a State Cannot Impose Use Tax Collection and Payment Obligations on an Out-of-State Mail Order Company with No Physical Presence in the State

In *Bellas Hess*, this Court held that states may not constitutionally require an out-of-state seller to collect use tax on mail order sales to residents of a state in which the seller's only contacts are by mail or common carrier. The Court found that such interstate contacts could not create a connection, or "nexus," sufficient to support the imposition of use tax collection obligations without violating the Commerce Clause and the Due Process Clause of the Fourteenth Amendment. In reaching this result, this Court formulated the appropriate test for nexus by focusing on the seller's physical presence, *i.e.*, "retail outlets, solicitors, or property," within the taxing state. *Bellas Hess*, 386 U.S. at 758.

This Court concluded that allowing Illinois to impose use tax collection and payment obligations on the out-of-state mail order seller would create "unjustifiable local entanglements" of interstate commerce. *Bellas Hess*, 386 U.S. at 760. "The many variations in rates of tax, in allowable exemptions, and in administrative and record-keeping requirements could entangle National [Bellas

[3] U.S. Const. art. VI, cl. 2.

Hess'] interstate business in a virtual welter of complicated obligations to local jurisdictions . . . ." *Id.* at 759-60 (footnotes omitted).

The North Dakota Supreme Court here conceded that *Bellas Hess* was directly on point (*see* Pet. App. A5), but nevertheless asserted "that the foundational basis of *Bellas Hess* has been eroded and that the Supreme Court would so conclude." Pet. App. A13.[4] In support of its extraordinary conclusion that this Court has abandoned *Bellas Hess*, the North Dakota court cited no decision of this Court rejecting the result in *Bellas Hess*, nor even an opinion questioning its reasoning. Rather, the court quoted liberally from then-Justice Fortas' dissent in *Bellas Hess* itself and concluded that the dissent accurately "forecast" the diminished value of that precedent. Pet. App. A7-A9.

Contrary to the North Dakota Supreme Court's reasoning, this Court has never wavered in its adherence to *Bellas Hess*: that decision remains the benchmark for determining whether sufficient nexus exists to allow a state to impose tax collection and payment obligations on an interstate business consistent with the Commerce Clause and Due Process Clause.[5]

The North Dakota court urged that the "obsolescen[ce]" of *Bellas Hess* was most clearly demonstrated by the "striking shift in the Court's position on taxation of interstate commerce . . . in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977)." Pet. App. A13. There this Court announced a four-part test for

[4] In contrast, the North Dakota District Court recognized the continuing validity of *Bellas Hess* and held the application of the tax to Quill unconstitutional. *See* Pet. App. A38-A42, A5.

[5] *See National Geographic Society v. California Bd. of Equalization*, 430 U.S. 551, 559 (1977); *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 626 (1981); *D.H. Holmes v. McNamara*, 486 U.S. 24, 33 (1988); *Goldberg v. Sweet*, 488 U.S. 252, 263 (1989).

invalidating state tax laws under the Commerce Clause.[6] *Complete Auto* continued to require a showing of "substantial nexus," and this Court on at least four occasions since the decision in *Complete Auto* has reaffirmed *Bellas Hess* and made clear that it is entirely consistent with the *Complete Auto* decision.

One month after the decision in *Complete Auto*, this Court in *National Geographic Society v. California Bd. of Equalization*, 430 U.S. 551 (1977), applied the physical presence test to determine nexus and rejected a claim that the "slightest presence" in the state was sufficient. *Id.* at 556. In doing so the Court reaffirmed *Bellas Hess*' "careful[] underscor[ing of] . . . the 'sharp distinction . . . between mail order sellers with retail outlets, solicitors, or property within [the taxing] State, and those [like *Bellas Hess*] who do no more than communicate with customers in the State by mail or common carrier as part of a general interstate business.'" *Id.* at 559 (quoting from *Bellas Hess*, 386 U.S. at 758.

In *Commonwealth Edison Co. v. Montana*, 453 U.S. 609 (1981), this Court noted that *Bellas Hess* is the touchstone of the first prong of *Complete Auto*: "Under this threshold test, the interstate business must have a substantial nexus with the State before *any* tax may be levied on it. *See National Bellas Hess, Inc. v. Illinois Revenue Dep't*, 386 U.S. 753 (1967)." *Commonwealth Edison*, 453 U.S. at 626 (emphasis in original). In 1988, this Court unanimously reaffirmed its *Bellas Hess* holding in *D.H. Holmes Co. v. McNamara*, 486 U.S. 24, 33 (1988):

> In *National Bellas Hess*, we held that the State of Illinois could not, consistently with the Commerce Clause, compel an out-of-state mail order company to collect a use tax on purchases of goods by Illinois residents when the seller's only connection with its Illinois customers was by mail or common carrier.

See Pet. at 13.[7]

Finally, in *Goldberg v. Sweet*, 488 U.S. 252 (1989), this Court again relied on *Bellas Hess* as the benchmark for measuring sufficient taxing nexus. Discussing a Commerce Clause challenge to the taxation of interstate telecommunications, this Court noted, "We also doubt that termination of an interstate telephone call, by itself, provides a substantial enough nexus for a State to tax a call. *See National Bellas Hess, Inc. v. Department of Revenue of Illinois*, 386 U.S. 753 (1967) (receipt of mail provides insufficient nexus)." *Goldberg*, 488 U.S. at 263. Thus, the very cases upon which the North Dakota Supreme Court relied as undermining *Bellas Hess* (*see* Pet. App. A13-A24) themselves reaffirmed the *Bellas Hess* decision.[8]

[6] Under that test, a state tax will be invalidated unless "the tax is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State." 430 U.S. at 279.

[7] The North Dakota Supreme Court suggested that in *Holmes* "the Court chose to stress economic presence, the phraseology of the *Bellas Hess* dissent." Pet. App. A17. In fact, this Court in *Holmes* did no such thing. Rather it relied on physical presence within the state. *D.H. Holmes*, 486 U.S. at 32-33.

[8] The court below also relied on *Tyler Pipe Indus., Inc. v. Washington State Dep't of Revenue*, 483 U.S. 232 (1987) and *Standard Pressed Steel v. Washington Dep't of Revenue*, 419 U.S. 560 (1975), as undermining *Bellas Hess*. Those cases did not do so directly or by implication. *Tyler Pipe* upheld taxing jurisdiction because the taxpayer's employee resided in the State and performed substantial activities on the taxpayer's behalf there. Thus, the taxpayer maintained a significant physical presence in the State. In *Standard Pressed Steel*, this Court similarly upheld imposition of the State's business and occupation tax on a company because its employee had "a full-time job within the State . . . ." 419 U.S. at 562.

The North Dakota court additionally relied on personal jurisdiction cases (Pet. App. A19-A21) that exclusively address the due process concerns that limit a state's exercise of *personal* jurisdiction over a nonresident. The North Dakota court failed to note

This conclusion that *Bellas Hess* is still good law is demonstrated not only by this Court's own decisions, but also by the overwhelming number of lower federal and state courts that have acknowledged the continuing vitality of *Bellas Hess*.[9] Recognizing the fact that *Bellas*

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that this Court in *Bellas Hess* refused to adopt a standard fashioned from these personal jurisdiction cases. In *Bellas Hess*, the State directly urged the Court to adopt the economic presence test that had already been applied in personal jurisdiction cases for at least ten years. *See* Brief for Appellee at 32-34, *Bellas Hess*, 386 U.S. 753 (O.T. 1966, No. 241).

[9] *See, e.g., Direct Marketing v. Bennett*, No. Civ. S-88-1067 (E.D. Cal. July 12, 1991) (1991 U.S. Dist. LEXIS 10736) (*Bellas Hess* prohibits California from imposing use tax collection obligations on direct marketers based solely on solicitation in the State and acceptance of credit cards issued by California financial institutions); *Alaska Airlines, Inc. v. Dep't of Revenue*, 769 P.2d 193, 198 (Or. 1989), *cert. denied*, 110 S.Ct. 717 (1990) (noting that *Bellas Hess* comprises first prong of *Complete Auto* test); *Burke & Sons Oil Co. v. Director of Revenue*, 757 S.W.2d 278, 280 (Mo. App. 1988) (*Bellas Hess* establishes that "[m]erely communicating with customers in a state by mail or common carrier as part of a general interstate business does not create a sufficient nexus"); *Good's Furniture House, Inc. v. Iowa State Bd. of Tax Review*, 382 N.W.2d 145, 150 (Iowa), *cert. denied*, 479 U.S. 817 (1986) (state tax must meet nexus test articulated in *Miller Bros. v. Maryland*, 347 U.S. 340 (1954), and refined by *Bellas Hess* and *National Geographic*); *Avco Financial Serv. Consumer Discount Co. One, Inc. v. Director Div. of Taxation*, 494 A.2d 788, 795 (N.J. 1985) (distinguishing *Bellas Hess* on ground of "distinctive contacts" with the State: "Unlike the mail order house in *National Bellas Hess*, or the department store in *Miller Brothers*," this seller "entered the taxing state to dun its customers," used "affiliated in-state offices for customers to drop payments," used the State's credit service agencies, and "invoked the State's process to enforce its contracts"); *National Meat Ass'n v. Deukmejian*, 743 F.2d 656, 658 n.1 (9th Cir. 1984), *aff'd*, 469 U.S. 1100 (1985) (comparing *National Geographic* and *Bellas Hess*, noting that factor establishing nexus in *National Geographic* was maintenance of offices in state); *Evanston Ins. Co. v. Merin*, 598 F. Supp. 1290, 1305 (D.N.J. 1984) (*Bellas Hess* is the "leading case defining the minimal connection required between an out-of-state business and a state before the state may impose tax liability," and "critical threshold" for triggering the

Hess controls lower courts' inquiry into the constitutionality of states' attempts to tax out-of-state mail order houses, these courts have applied *Bellas Hess* to invalidate states' imposition of use tax collection obligations on businesses which lack a physical presence in the state.[10] Just within the last five months, two state supreme courts have invalidated their states' attempts to impose use tax collection duties on businesses that do not have a physical presence in the state. *See SFA Folio Collections, Inc. v. Bannon*, 585 A.2d 666 (Conn.), *cert. denied sub nom. Commissioner of Revenue Services v. SFA Folio Collections, Inc.*, 111 S.Ct. 2839 (1991); *Bloomingdale's By Mail, Ltd. v. Dep't of Revenue*, 591 A.2d 1047 (Pa. 1991), *aff'g* 567 A.2d 773 (Pa. Commw. Ct. 1989) (per curiam). And most recently, a federal district court invalidated California's attempt to impose use tax collection obligations on direct marketing companies with no physical presence in that State. *Direct Marketing v. Bennett*, No. Civ. S-88-1067 (E.D. Cal. July 12, 1991) (1991 U.S. Dist. LEXIS 10736).[11]

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power to tax is whether company "stations agents or establishes offices to conduct any business in the taxing state." *Id.* at 1306); *Illinois Commercial Men's Ass'n v. State Bd. of Equal.*, 671 P.2d 349, 355 (Cal. 1983), *app dism'd*, 466 U.S. 933 (1984) (presence of agents in State formed "definite link" and "minimum connection" required to justify imposition of gross premium tax); *Boswell v. Paramount Television Sales, Inc.*, 282 So. 2d 892, 897 (Ala. 1973) (emphasizing that *Bellas Hess* requires physical presence).

[10] *See, e.g., SFA Folio Collections, Inc. v. Bannon*, 585 A.2d 666 (Conn.), *cert. denied sub nom. Commissioner of Revenue Services v. SFA Folio Collections, Inc.*, 111 S.Ct. 2839 (1991); *Cally Curtis Co. v. Groppo*, 572 A.2d 302 (Conn.), *cert. denied*, 111 S.Ct. 77 (1990); *Bloomingdale's By Mail, Ltd. v. Dep't of Revenue*, 591 A.2d 1047 (Pa. 1991), *aff'g* 567 A.2d 773 (Pa. Commw. Ct. 1989) (per curiam); *L.L. Bean, Inc. v. Commonwealth of Pennsylvania*, 516 A.2d 820 (Pa. Commw. Ct. 1986); *Book-of-the-Month Club, Inc. v. Porterfield*, 268 N.E.2d 272, 274 (Ohio 1971).

[11] Use tax legislation proposed in both the 100th and the 101st Congress, as well as accompanying congressional hearings, also

No feature of this case distinguishes it from *Bellas Hess*; indeed, the North Dakota court's holding bears a striking resemblance to the decision of the Illinois Supreme Court in *Bellas Hess*, which this Court reviewed and reversed.[12] The North Dakota Supreme Court urged that it could not "ignore the tremendous social, economic, commercial and legal innovations since 1967 . . . ." Pet. App. A10. The court pointed to increased volume of mail order business, finding that to be "the greatest change in mail order since 1967 . . . ." Pet. App. A12.

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reflect the states' acknowledgement of a lack of authority to alter the mandates of *Bellas Hess*. *See Interstate Sales Tax Collection Act of 1987 and the Equity in Interstate Competition Act of 1987: Hearings on H.R. 1242, H.R. 1891, and H.R. 3521 Before the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary*, 100th Cong., 2d Sess. 362 (1988) (noting the involvement of the National Association of Counties, the National Conference of State Legislators, the National Governors' Association, the National League of Cities, and the United States Conference of Mayors) (*"Hearings on H.R. 1242, H.R. 1891 and H.R. 3521"*). *See also* H.R. 2230, 101st Cong., 1st Sess., 135 Cong. Rec. H1662 (daily ed. May 4, 1989); S. 480, 101st Cong., 1st Sess., 135 Cong. Rec. 1918 (daily ed. March 1, 1989); H.R. 3521, 100th Cong., 1st Sess., 133 Cong. Rec. 28619 (1987); H.R. 1891, 100th Cong., 1st Sess., 133 Cong. Rec. 7727 (1987); H.R. 1242, 100th Cong., 1st Sess., 133 Cong. Rec. 4087 (1987); S1099, 100th Cong., 1st Sess., 133 Cong. Rec. 10108 (1987); S. 639, 100th Cong., 1st Sess., 133 Cong. Rec. 4587 (1987).

[12] The Illinois court's holding was premised on the State's alleged authority to assert taxing jurisdiction based solely on continuous solicitation. *See Department of Revenue v. National Bellas Hess, Inc.*, 214 N.E.2d 755, 759 (Ill. 1966), *rev'd*, 386 U.S. 753 (1967) ("[t]he important question is whether there is 'exploitation of the consumer market' by continuous solicitation and not whether the company used local advertising, salesmen, brokers or catalogues . . . ."). This argument was repeated by the Illinois Commissioner of Revenue before this Court. Brief for Appellee at 7-9, 18, *Bellas Hess*, 386 U.S. 753 (O.T. 1966, No. 241) (State argued that sufficient nexus exists when seller "in a systematic and continuous aggressive manner exploited the Illinois consumer market" by soliciting sales through catalog distribution).

The court below also noted that there were new methods for ordering goods, including "toll-free telephone lines, fax orders, and direct computer ordering," and the new methods for delivery of such goods, including "advances in the parcel delivery industry . . . including overnight delivery." *Id.* But neither the actual volume of sales nor the use of new methods of interstate communications can alter the constitutional principles. The Court in *Bellas Hess* implicitly recognized that the constitutional rule announced in that case cannot fluctuate with quantitative factors such as sales volume or the size of the mail order industry.[13]

Despite the assertions of the court below, there is also nothing "new" in the mail order industry that affects this Court's constitutional analysis of the burden imposed upon mail order companies by the collection of out-of-state use taxes. While computers might make it easier for mail order firms to calculate the tax due to each jurisdiction, profound administrative burdens still remain,[14] and "[o]n

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[13] Although the Court was clearly aware that the sizable number of mail order sales at issue in 1967 would increase in coming years (*see Bellas Hess*, 386 U.S. at 764 (Fortas, J., dissenting), the size of the industry itself did not affect the Court's constitutional analysis. It is likewise irrelevant here.

The North Dakota court's emphasis on a change in the "sheer volume" of the mail order industry also overlooks the very substantial character of the mail order business directly at issue in *Bellas Hess*. In *Bellas Hess* nearly twice as much sales volume was at issue. *Cf. Bellas Hess*, 386 U.S. at 761 (Fortas, J., dissenting) (Bellas Hess' sales to Illinois residents in the fifteen month period at issue in that case totalled $2,174,744) *with State by Heitkamp v. Quill Corp.*, 470 N.W.2d 203, 204 (N.D. 1991) (Quill's annual sales to residents in North Dakota are "just under $1,000,000").

[14] *See, e.g., Collection of State Sales and Use Taxes by Out-of-State Vendors: Hearing on S. 593 and S. 1099 Before the Subcomm. on Taxation and Debt Management of the Senate Comm. on Finance*, 100th Cong., 1st Sess. 52 (1987) (*"Hearing on S. 639 and S. 1099"*) (testimony of Alan Glazer). Witnesses have noted that computer tax programs are not equipped to recognize tax

average, mail-order companies bear six or seven times the collection costs of in-state retailers who can collect sales tax at the cash register." Note, *Collecting the Use Tax on Mail Order Sales*, 79 Geo. L.J. 535, 541 (1991).[15] Far from receding wtih the passage of time, the compliance burdens on out-of-state mail order companies have actually grown.[16] In 1967, this Court noted that it

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exemptions for products, which vary from jurisdiction to jurisdiction, nor can such programs judge whether products fit within a given exemption. *See, e.g., Interstate Sales Tax Collection Act of 1987: Hearing on H.R. 1242 Before the Subcomm. on Select Revenue Measures of the House Comm. on Ways and Means*, 100th Cong., 1st Sess. 178 (1987) (testimony of Heath Kline); *Hearing on S. 639 and S. 1099* at 53 (testimony of Robert Levering).

[15] Collection obligations are still much more burdensome on mail order companies than on local retailers. Many customers still pay for mail order or merchandise by check and money order, and often make mistakes in calculating tax. *Hearings on H.R. 1242, H.R. 1891 and H.R. 3521* at 207 (testimony of William T. End). When mistakes occur, the mail order company must either pay the tax itself or bill the customer for the additional tax. Even the computer tax programming industry itself admits that this burden cannot be lifted by computer technology. *Hearing on S. 639 and S. 1099* at 206 (letter from Ray Westphal, President Vertex Systems).

[16] The *Bellas Hess* Court noted that in 1965, "over 2,300 localities" imposed local sales tax (*Bellas Hess*, 386 U.S. at 759 n.12); today, approximately 6,500 jurisdictions have the statutory authority to impose sales and use taxes. *See*, Note, *Collecting the Use Tax on Mail Order Sales*, 79 Geo. L.J. 535, 539 (1991). Today as in 1967, "[h]ardly two States provide identical exemptions," Brief for Appellant at 26-27, *Bellas Hess*, 386 U.S. 753, (O.T. 1966, No. 241), but now, because of the growth in taxing jurisdictions, the exemption burden has grown almost threefold. And aside from the enormous recordkeeping and record production requirements, the growth in the number of taxing jurisdictions raises the specter of nearly perpetual audits. *Interstate Sales Tax Collection Act of 1987: Hearing on H.R. 1242 Before the Subcomm. on Select Revenue Measures of the House Comm. on Ways and Means*, 100th Cong., 1st Sess. 31-32 (1987) (colloquy between Rep. Judd Gregg and Deputy Assistant Secretary of the Treasury O. Donaldson

must prohibit Illinois' imposition of use tax collection obligations on National Bellas Hess because otherwise, the "many variations in rates of tax, in allowable exemptions, and in administrative and recordkeeping requirements . . . could entagle National [Bellas Hess'] interstate business in a virtual welter of complicated obligations to local jurisdictions . . . ." *Bellas Hess*, 386 U.S. at 759-60. That is clearly still the case.

Finally, North Dakota and other states address their arguments to the wrong forum when they express continued dissatisfaction with their inability to force out-of-state companies with no physical presence in their states to collect use tax on goods purchased by their states' consumers. This Court in *Bellas Hess* specifically noted (*id.* at 760) that Congress has authority to fashion an equitable and forward-looking system for the collection of state use tax by out-of-state sellers that would avoid upsetting the settled expectations of the parties and reduce the burdens and inequities that individual state local collection efforts would impose.[17] Congress is well aware of the claims of the state taxing authorities: in recent years numerous bills have been introduced to achieve legislatively the goal that the State seeks here.[18] While there is

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Chapoton). *Cf.*, Brief for Appellant at 27-28, *Bellas Hess*, 386 U.S. 753, (O.T. 1966, No. 241).

[17] *See L.L. Bean, Inc. v. Commonwealth of Pennsylvania*, 516 A.2d 820 (Pa. Commw. Ct. 1986). In *Bean*, the court noted the State's frustration with the limitations imposed on state action by *Bellas Hess*, but explained, "[T]his problem, which is one of national concern, is more properly dealt with by Congress than by judicial lawmaking. Until legislative action is taken, *National Bellas [Hess]* and *Miller Brothers* represent the current state of the law and we are bound by them." *Id.* at 826-27.

[18] *See, e.g.*, S. 2368, 100th Cong., 2d Sess. (1988); H.R. 3521, 100th Cong., 1st Sess. (1987); H.R. 1891, 100th Cong., 1st Sess. (1987). Hearings have been conducted on a number of legislative proposals. *See, e.g., State Taxation of Interstate Commerce: Hearing on S. 1510 Before the Subcomm. on Taxation and Debt*

debate about the form that such legislation should take, some of these proposals would seek to address the substantial compliance burdens for out-of-state mail order firms and their customers by establishing a uniform national rate of tax, an adequate collection allowance, uniform national definitions of exempt items, a uniform tax treatment of shipping and handling charges and a single filing and audit procedure.[19]

B. The North Dakota Court Neglected Its Duty Under the Supremacy Clause To Apply *Bellas Hess* and Invalidate the North Dakota Use Tax Statute

Obviously, the North Dakota court has misunderstood its duty under the Supremacy Clause. When a question of federal right is submitted to a state court, it is the duty of that court "to administer the law prescribed by the Constitution . . . as construed by this Court." *South Carolina v. Bailey*, 289 U.S. 412, 420 (1933).[20] This is so even in areas when, unlike the present situation, some doubt exists as to whether this Court would adopt the approach

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Management of the Senate Comm. on Finance, 99th Cong., 1st Sess. (1985); *Interstate Sales Tax Collection Act of 1987: Hearing on H.R. 1242 Before the Subcomm. on Select Revenue Measures of the House Comm. on Ways and Means*, 100th Cong., 1st Sess. (1987); *Hearings on S. 639 and S. 1099; Hearings on H.R. 1242, H.R.1891 and H.R. 3521.*

[19] *See, e.g.*, Committee on State Taxation of the Counsel of State Chambers of Commerce, *COST Endorses Compromise on Bellas Hess Legislation*, State Tax Report No. 244 at 1 (Dec. 15, 1989).

[20] *See also, e.g., Cooper v. Aaron*, 358 U.S. 1, 18 (1958) ("The federal judiciary is supreme in the exposition of the law of the Constitution"); *Henry v. City of Rock Hill*, 376 U.S. 776, 777 n. (1964) (a Supreme Court decision interpreting the Federal Constitution, "under the Supremacy Clause, is binding upon state courts as well as upon federal courts"); *Chesapeake & Ohio Ry. v. Martin*, 283 U.S. 209, 221 (1931) (determination of a federal question by the Supreme Court "is binding upon the state courts and must be followed, any state law, decision, or rule to the contrary notwithstanding").

as an initial matter. As this Court has explained, "If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the [lower courts] should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989). "A different principle would lead to the most mischievous consequences. The courts of the several States might determine the same questions in different ways. There would be no uniformity of decisions." *The Mayor v. Cooper*, 73 U.S. (6 Wall.) 247, 253 (1867). The premise of the North Dakota Supreme Court's approach was that if there were doubt as to the continued validity of *Bellas Hess*, the statute would necessarily have to be upheld because "[a]ny doubt must be resolved in favor of the constitutionality of the statute." Pet. App. A27. Here the North Dakota Supreme Court has mistaken its role. It was obligated to apply the controlling principles of *Bellas Hess*, and its failure to do so marks a significant departure from the appropriate role of a subordinate court.

II. THIS COURT SHOULD SUMMARILY REVERSE THE NORTH DAKOTA SUPREME COURT'S DECISION

In view of the North Dakota court's failure to follow controlling precedent, the Court should grant certiorari and summarily reverse (*see* Sup. Ct. R. 16.1), as it has done in the past in similar circumstances. In *Thurston Motor Lines v. Jordan K. Rand, Ltd.*, 460 U.S. 533 (1983) (per curiam), for example, a panel of the Ninth Circuit refused to follow a sixty-five year old precedent of this Court,[21] " 'doubt[ing] that [the precedent was] still good law.' " *Id.* at 535 (quoting Ninth Circuit opinion). This Court reversed and remanded the case, commenting,

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[21] *Louisville & Nashville R.R. v. Rice*, 247 U.S. 201 (1918).

"Needless to say, only this Court may overrule one of its precedents. Until that occurs, [the precedent] is the law, and the decision below cannot be reconciled with it." This Court has also granted summary reversal in numerous other cases in which controlling precedent has been ignored by the lower courts.[22]

The State also argued below that the presence of *Quill's* licensed computer programs within the state established a sufficient physical presence under *Bellas Hess*, and the North Dakota Supreme Court relied on the fact that "[t]hrough its licensing agreement [for computer software to North Dakota's customers] Quill clearly retains right to property situated in North Dakota providing further nexus with the State." Pet. App. A29-A30. We agree with petitioner that such minimal contacts with the state are irrelevant for purposes of the *Bellas Hess* analy-

[22] *See, e.g., Delo v. Stokes*, 110 S.Ct. 1880 (1990) (per curiam) (reversing federal court decision for failure to follow *Barefoot v. Estelle*, 463 U.S. 880 (1983), which held that a second or successive federal habeas petition should be granted only where there are substantial grounds upon which relief may be granted); *Smith v. Ohio*, 110 S.Ct. 1288 (1990) (per curiam) (reversing state court judgment for failure to follow, *inter alia*, *Johnson v. United States*, 333 U.S. 10 (1948), and *Sibron v. New York*, 392 U.S. 40 (1968), holding that police cannot use an incident search to justify an ensuing arrest); *Powell v. Texas*, 492 U.S. 680 (1989) (per curiam) (reversing state court judgment for failure to follow *Estelle v. Smith*, 451 U.S. 454 (1981), establishing a defendant's right to be informed before a psychiatric examination concerning future dangerousness that he has a right to remain silent and that anything he says can be used against him at his sentencing proceeding); *Olden v. Kentucky*, 488 U.S. 227 (1988) (per curiam) (reversing and remanding state court judgment for failure to follow *Davis v. Alaska*, 415 U.S. 308 (1974), establishing a right to conduct reasonable cross-examination); *City of Newport v. Iacobucci*, 479 U.S. 92 (1986) (per curiam) (reversing and remanding a federal court decision for failure to follow *New York State Liquor Authority v. Bellanca*, 452 U.S. 714 (1981) (per curiam), allowing states to prohibit nude dancing in establishments that sell liquor).

sis,[23] and summary reversal is appropriate on this issue as well. Alternatively, this Court may wish to reverse and remand so that the state court can reconsider its decision under a proper constitutional standard.[24] Under either procedural alternative, it is imperative that this Court not permit its precedent, upon which an entire industry has relied for the past quarter century, to be ignored by state courts responsible for applying federal constitutional principles. To do so would be to invite similar conduct by other state revenue departments and state courts, with the resulting confusion and erosion of established constitutional doctrine.

[23] In *Cally Curtis Co. v. Groppo*, 572 A.2d 302 (Conn.), *cert. denied*, 111 S.Ct. 77 (1990), the Connecticut Supreme Court rejected the contention that the presence in the state of tapes rented by Cally Curtis to Connecticut business was sufficient for nexus purpose.

[24] *See, e.g., Palmer v. BRG of Georgia, Inc.*, 111 S.Ct. 401, 403 n.7 (1990) (reversing and remanding on the ground that the federal court below failed to apply *United States v. Topco Assocs. Inc.*, 405 U.S. 596 (1972)).

The North Dakota Supreme Court rejection of *Bellas Hess* was clearly a predicate to its entire decision. See Pet. App. A13.

CONCLUSION

The petition for a writ of certiorari should be granted, and the North Dakota Supreme Court's decision should be summarily reversed.

Respectfully submitted,

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